No. 93-284

In The

Supreme Court of the United States

October Term, 1993

SECURITY SERVICES, INC.,

Petitioner,

v.

K MART CORPORATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF FOR PETITIONER

PAUL O. TAYLOR
Counsel of Record
1275 Capital Centre
386 North Wabasha Street
St. Paul, MN 55102
(612) 224-4852

THOMAS A. MILLER
2090 West 98th Street
Bloomington, MN 55431
(612) 881-6577

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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SUMMARY OF ARGUMENT

The dispute giving rise to this litigation contrasts the enforcement of a filed tariff against an unfiled, negotiated rate specifically declared to be illegal by the plain language of the Interstate Commerce Act. This case has nothing to do with an ambiguous, ineffective or unfiled tariff. The tariff at issue in this case sets forth distance rates and a method for applying those rates. The Interstate Commerce Act clearly mandates the collection of filed tariff rates and neither the Interstate Commerce Commission ("ICC" or "Commission") nor a court has the power to subordinate a tariff to a secret, illegal rate agreement.

In the Motor Carrier Act of 1980, Congress reaffirmed the core purpose of the Interstate Commerce Act which is to provide for public filing of tariffs and the elimination of secret rate agreements outside of filed tariffs. Congress chose not to expand the existing remedies for violations of ICC promulgated tariff regulations. Under these circumstances, the existing remedies which are set forth in the Act are necessarily exclusive.

Against this backdrop of statutory rate regulation, the Government urges that the Act implicitly authorizes the ICC to declare a filed tariff to be "ineffective" if it violates a tariff publication regulation promulgated by the ICC. However, the Act and the relevant case law strictly confine the ICC's power to treat a tariff as retroactively void to limited circumstances and then only pursuant to a specific mandate of the Congress.

The Commission's "void-for-nonparticipation" rule applied by the Court of Appeals below is merely another thinly-veiled attempt by the Commission to create an extra-statutory, unregulated free-for-all where private rate agreements control interstate transportation and filed tariffs are ignored. Though the Act authorizes the Commission to prescribe information to be contained in tariffs, the ICC lacks authority to waive collection of filed tariff rates.

ARGUMENT

I. RISS TARIFF NO. 501-B WAS EFFECTIVE.

Try as they may to convince this Court that Riss Tariff No. 501-B was never effective, K Mart Corporation ("K Mart") and the Government cannot ignore the plain fact that the tariff was received, stamped, accepted, filed and never rejected by the Commission. J.A. 25-32. Clearly, the Riss 501-B tariff meets even the Commission's own espoused test for an applicable, i.e. effective, tariff. *See, Acme Peat Products, Ltd. v. Akron, C. & Y.R. Co.*, 277 I.C.C. 641, 644 (1950) ("Where tariffs are tendered to and accepted by the Commission, the rates therein become applicable, even though technically they should have been rejected upon tender.") This same definition of an effective tariff, now apparently rejected by the Commission, was used by the Court of Appeals in *Overland Express, Inc. v. Interstate Commerce Commission*, 996 F.2d 356, 361 (D.C. Cir. 1993) n. 5, *petition for cert. filed*, 62 U.S.L.W. 3420 (U.S. Dec. 3, 1993) (No. 93-883) in determining that a carrier had a valid tariff on file.

The Government relies upon the ICC decisions in *Glidden Co. v. Chesapeake & O. Ry. Co.*, 229 I.C.C. 599 (1938) and *Constitution Stone Co. v. Baltimore & O.R. Co.*, 231 I.C.C. 562 (1939) for the proposition that a rate is inapplicable even though erroneously cancelled. Petitioner does not take issue with that proposition but such a contention is irrelevant here as Riss Tariff No. 501-B has never been cancelled.

In *Glidden* the defendant carrier had erroneously caused a tariff provision to be cancelled prior to the movement of the shipments at issue therein resulting in

the imposition of a higher, applicable rate. In a complaint proceeding before the Commission the carrier had admitted that the higher, applicable rate was unreasonably high. *Id.* at 601. The Commission allowed waiver of the undercharges based on the applicable tariff because the rates contained therein were unreasonably high and not because of nonparticipation in a referenced tariff.

In *Constitution Stone Co. v. Baltimore & O.R. Co.*, 231 I.C.C. 562 (1939) a shipper, Constitution Stone Co., challenged the reasonableness of an otherwise applicable rate in a complaint proceeding before the Commission. The rates became applicable only through inadvertent cancellation of another tariff provision. The carrier admitted the applicable rate was unreasonably high. The Commission awarded reparations and allowed waiver of the undercharges. *Constitution Stone* at 565.

Contrary to the Government's contention both *Glidden* and *Constitution Stone* are inapplicable here because the rates set forth in Riss Tariff No. 501-B were never cancelled. They are also inapplicable because the cases involved rail carriers for which the Commission has authority to waive undercharges. It lacks such authority with respect to motor carriers. *See, Informal Procedure for Determining Reparation*, 335 I.C.C. 403, 413 (1969). Moreover, those two cases actually support Petitioner's contention set forth in its Brief on the Merits that challenges to the lawfulness of rates are to be made in a complaint proceeding before the Commission.[1]

[1] This same point was made by this Court in *Reiter v. Cooper*, 507 U.S. ___, 113 S.Ct. 1213, 1220 (1993) n.3.

II. Riss Tariff No. 501-B Disclosed the Precise Rates To Be Charged.

In *Berwind-White Coal Mining Co. v. Chicago & E.R. Co.*, 235 U.S. 371 (1914), this Court held that when tariff sheets and other documents are placed on file with the Commission without objection as to their form, and give notice of the rates to be charged, then the rates stated therein are effective. This is the case even if the carrier merely sends a letter disclosing rates to the Commission. *Berwind at* 375.

The Government argues that Riss Tariff No. 501-B did not give notice of the rates to be charged. Relying on the clever use of excerpts from various distance guides,[2] the Government argues that the rates in the Riss tariff are unclear or imprecise. A simple reading of Riss Tariff No. 501-B, however, discloses the distance rates to be charged. J.A. 30-32. Item 100 of Tariff No. 501-B directs the tariff user to the particular distance guide used to determine distances. J.A. 27. Significantly, Item 100 of the tariff incorporates not only the distance guide then in effect but also supplements and reissues of that same distance guide. J.A. 27. Thus, no tariff user could possibly be confused as to the applicable rate or the distance guide

[2] In either an attempt to create unnecessary confusion or out of ignorance the Government has incorporated into its brief excerpts from the Household Goods Carriers Bureau Zip Code Distance Guide. That Guide is not referred to anywhere in the Riss 501-B tariff. Thus, any person who read Riss Tariff No. 501-B could not possibly be misled into believing the Zip Code Mileage Guide is applicable for the account of Riss.

to be used at any given time period. Through its publication of Tariff 501-B Riss has bound itself to be governed by the Household Goods Carriers Bureau Distance Guide No. 100-A.

The Government claims that after February 19, 1985, when Riss was no longer named as a participant in the distance guide, a shipper who consulted the list of carriers participating in the distance guide might be confused as to the distance guide applicable for Riss. This is not the case since no carriers are actually listed in the distance guide itself. J.A. 35. Rather they are listed in Tariff No. ICC HGB 101-B, a separate tariff naming participating carriers. J.A. 11-24. Riss Tariff No. 501-B is not governed by that participating carrier's tariff but only by the distance guide. J.A. 27. Moreover, the Commission's claimed voiding power does not come into play in such a case. Rather the alleged voiding power applies when the carrier has failed to provide a private power of attorney to the publisher of the distance guide. 49 C.F.R. § 1312.4(d).

No public disclosure of rates is effected through the execution of a private power of attorney. Indeed the Commission has abolished the filing of powers of attorney. *Revision of Tariffs, All Carriers,* 1 I.C.C.2d 404, 408 (1984) ("These documents are not used by us.").[3]

[3] When the Commission overhauled its tariff regulations in 1984 and abolished the filing of powers of attorney, it stated that in amending its regulations it desired to "retain only those rules that are truely necessary to carry out the statutory disclosure function of tariffs." *Revision of Tariffs, All Carriers,* 1 I.C.C.2d 404, 405 (1984).

The disclosure of rates applicable to interstate transportation via Riss was effected through the filing of Riss Tariff No. 501-B, including its incorporation of the distance guide. No objection was ever made as to the form of the tariff. Thus the tariff is enforceable under the principle announced by this Court in *Berwind, supra.*

III. The Commission's Decision in *Jasper Wyman & Son* is Another Attempt by the Commission to Avoid Enforcement of Filed Rates.

Since at least as early as 1986, the ICC has engaged in a conscious attempt to avoid enforcing the statutory requirement of adherence to tariff rates set forth in 49 U.S.C. §§ 10761(a) and 10762(a). *See, ICC v. Transcon Lines,* 9 F.3d 64, 67 (9th Cir. 1993) ("[W]e are in the unusual situation in which an agency has a record of challenging what the judiciary has interpreted to be the very heart of the statute that gave the agency life"). While the Commission has tried various approaches to avoid enforcement of filed rates it has been rebuked by the courts. For example in *Regular Common Carrier Conference v. United States,* 793 F.2d 376 (D.C. Cir. 1986), the court held unlawful the ICC's authorization of a tariff permitting unfiled, negotiated rates to govern interstate transportation. In 1986 the Commission published its infamous decision in *NITL – Pet. to Inst. Rule on Negotiated Motor Car. Rates,* 3 I.C.C.2d 99 (1986), which was soundly rejected by this Court in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.,* 497 U.S. 116 (1990). The Commission was rebuked by the United States Court of Appeals for the Third Circuit in *White v. I.C.C.,* 989 F.2d 643 (3d Cir. 1993) when it attempted to impose rules which, *inter alia,* required a carrier to ask the

ICC for permission before it could demand payment for tariff undercharges. The Commission's decision in *Jasper Wyman & Son, et al. – Petition for a Declaratory Order – Certain Rates and Practices of Overland Express, Inc.*, 8 I.C.C.2d 246 (1992), *rev'd sub. nom., Overland Express, Inc. v. ICC*, 996 F.2d 356 (D.C. Cir. 1993), *petition for cert. filed*, 62 U.S.L.W. 3420 (U.S. Dec. 3, 1993) (No. 93-883), is merely another thinly-veiled attempt to avoid adherence to tariffs.

The Government's attempt to masquerade the void-for-nonparticipation rule as a matter of longstanding policy is exposed by the following facts made evident by Amicus Overland Express, Inc.'s appendix ("Overland App."):

1. From the time the ICC amended its tariff regulation in 1984, until 1993, the ICC had never rejected, or voided distance rates filed by a carrier for failure to participate in a governing distance guide. Overland App. 8, 17-24.

2. From 1984 to 1988 approximately 15,000 carriers, or 40% of all common carriers, which filed tariffs containing distance rates, referred to the HGB distance guide without formally participating therein. Overland App. 9.

3. The ICC routinely accepted tariffs containing methods of computing distances not authorized by 49 C.F.R. § 1312.30(c). Overland App. 9-12.

4. The ICC took no action to cancel tariffs after its own enforcement branch discovered in 1990 and 1991 that certain carriers published

distance rates referring to the HGB distance guide while never participating in the distance guide. Overland App. 25-38.

Any contention that the ICC had a longstanding policy of declaring tariffs void retroactively due to non-participation in a referenced tariff rings hollow in light of the above facts.

The Government traces the origin of the Commission's "enforcement" of the void-for-nonparticipation rule to *New England Motor Carrier Rates*, 8 M.C.C. 287 (1938) (*"New England Rates"*). In *New England Rates* the Commission declared joint motor-water rates illegal because the water carrier had not evidenced its participation in the joint line rates. There the ICC did not retroactively strike the rates. Rather it suspended the rates prior to their effectiveness and upon investigation ordered that the rates be cancelled. 8 I.C.C. at 330. Here, all of the rates sought to be collected were contained in Riss Tariff No. 501-B which was never suspended or investigated by the ICC. The only participation aspect is in the reference to a mileage guide used to determine the distances. As noted in the Government's Brief, a purpose of the participation rules is to ensure that each carrier is responsible for its own rates and is not unwillingly bound by the actions of another carrier. Brief for the United States at 10. That situation is simply not present here as Riss willingly bound itself to the mileage guide distances. As noted by the Seventh Circuit in *Brizendine v. Cotter & Co.*, 4 F.3d 457 (7th Cir. 1993), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. Dec. 20, 1993) (No. 93-1129), the carrier's decision to adopt the mileage guide "as its own" demonstrates that

the carrier "accepts responsibility for the publications guide," 4 F.3d at 465, n. 9.

The ICC also incorrectly cites *Halliburton Co. v. Consolidated Copperstate Lines,* 335 I.C.C. 201 (1969) as evidence of enforcement of the void-for-nonparticipation rule. The *Halliburton* case is not a tariff participation case nor did the ICC deny undercharges. Rather the Commission was presented with a simple question of interpretation of a tariff. The Commission was asked by a shipper whether or not minimum charges applied to the transportation of its freight when two of the carriers it utilized to handle the freight did not agree to waive the minimum charges.

The Commission found in *Halliburton* that because certain carriers were not party to a tariff note which listed those carriers, minimum charges did apply and the carriers were entitled to the higher charges they sought. 335 I.C.C. at 207. The issue in *Halliburton* was in no way related to a failure to participate in a tariff as that term is defined by the ICC's regulations. The Government's citation of *Halliburton* serves to highlight the weakness of its claim of ICC enforcement. *Halliburton* is clearly inapplicable here because it did not involve the voiding of a tariff and the imposition of an unfiled rate. Moreover in *Halliburton* the tariff clearly disclosed the rates and the carriers using those rates, just as Riss Tariff No. 501-B disclosed Petitioner's rates and the governing distance guide.

The court in *Overland, supra,* clearly recognized that the core purpose of the Act, public disclosure of rates, is undermined by the application of the Commission's *Jasper Wyman & Son* decision. When viewed in light of other recent Commission action it is clear that the Commission

is on a mission to avoid enforcement of tariffs. As the court in *Overland* recognized, "Complete abrogation of the filed rate is only necessary if the Commission's real purpose is to eliminate the Trustee's undercharge suits." 996 F.2d at 362.

IV. Imposition Of An Unfiled Rate Is The Antithesis Of Statutory Rate Regulation.

The Court of Appeals erred when it applied the ICC's tariff voiding regulation and failed to give legal effect to a tariff which was placed on file with the ICC, gave notice of the rates to be charged and was never rejected by the ICC or otherwise cancelled. The Government concedes that the ICC may not retroactively reject a filed tariff except within the limited confines established by this Court in *ICC v. American Trucking Associations, Inc.,* 467 U.S. 354 (1984), *reh'g denied,* 468 U.S. 1224 (1984) but contends that retroactive rejection is not at issue here because the Riss tariff which was accepted by the Commission was never really on file.

The decisions below give legal effect to an unfiled, negotiated rate agreement between the parties. However, this Court has held in no uncertain terms that secret rate agreements between carriers and their customers are circumscribed by tariffs. *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.,* 497 U.S. 116 (1990). Nevertheless the Government ignores this statutory prohibition and asserts that the ICC may fashion a remedy of voiding a tariff through the statutory authority to prescribe "other information" to be contained in tariffs. The fatal flaw in this argument is that the result of such a remedy is the imposition of an illegal, secret rate, and not the tariff rate.

The language contained in § 10761(a) of the Act is clear. There is nothing amibiguous about the Act's requirement of adherence to tariff rates. The Interstate Commerce Act could not be more explicit in prohibiting secret rate agreements such as involved here and specifying remedies therefor. The Act plainly does not provide a private remedy to a shipper allowing him to retain the fruits of an illegal bargain merely because a carrier has violated a rule which the Commission has characterized as relating to form and not substance. *Shobe, Inc. v. Bowman Transportation, Inc.*, 350 I.C.C. 664, 670 (1975). Congress has directed the ICC to enforce the Act's tariff requirements, not to eliminate them through creative interpretation of its regulations.

CONCLUSION

For the foregoing reasons, the Riss distance tariff is effective and the judgment of the Court of Appeals below should be vacated.

Respectfully submitted,

PAUL O. TAYLOR
1275 Capital Centre
386 North Wabasha Street
St. Paul, MN 55102
(612) 224-4852

THOMAS A. MILLER
2090 West 98th Street
Bloomington, MN 55431
(612) 881-6577

Attorneys for Petitioner